COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts	D.T.E. 01-20

MOTION OF AT&T FOR RECONSIDERATION OF A PORTION OF THE DEPARTMENT'S ORDER OF AUGUST 31, 2001, WITH RESPECT TO: (1) ONE INFORMATION REQUEST INVOLVING INTELLECTUAL PROPERTY OF THIRD PARTIES, AND (2) THE TIME FOR PRODUCING FURTHER RESPONSES

AT&T Communications of New England, Inc. ("AT&T") respectfully moves for reconsideration of two aspects of the Department's August 31, 2001 Order on Verizon's Appeal of Hearing Officer's August 8, 2001 Ruling on Motions to Compel ("August 31, 2001 Order").

First, AT&T seeks reconsideration of the portion of the August 31, 2001 Order that would require AT&T to physically produce, as distinguished from making completely available for review and analysis, "the geocoded data set for the State of Massachusetts used to produce the clusters in HAI 5.2a" as sought in Information Request VZ-ATT 1-23.[1] AT&T's offer to provide electronic access to the geocoded data (through the third-party that has limited licenses to use but not release this proprietary information) and to permit Verizon to subject that data to computer analyses fully allows both Verizon and the Department complete access to review and

[1] Request VZ-ATT 1-26 asks for the software that constitutes the clustering algorithm and the inputs used with that algorithm. The geocoded data set requested in VZ-ATT 1-23 is the same thing as the inputs sought in VZ-ATT 1-26. AT&T believes that it will be able to produce the separate clustering algorithm software also requested in VZ-ATT 1-26. AT&T's motion for reconsideration of the Department's new evidentiary standard and its order regarding the geocoded data set requested in VZ-ATT 1-23 also applies to so much of VZ-ATT 1-26 that requests the same information under a different description.

analyze in any way the customer location inputs to the HAI 5.2a-MA model. This mechanism for incorporating the data into the record is fully consistent both with the Department's past evidentiary practices, and with the more recent modifications of procedures the Department has implemented with respect to electronic communications between parties and the Department. In this way, the August 31, 2001, Order is a departure from the Department's long-standing application of its evidentiary standards -- a departure that imposes a new and more stringent standard than has been relied on in past proceedings, including the past UNE rate proceeding. This more stringent standard is also inconsistent with the manner in which Verizon has presented its own cost study in this proceeding. Most significantly, this standard would impose an unnecessary and inappropriate burden on parties and the Department in this and future proceedings.

Second, AT&T requests that the time in which it has to produce the additional discovery required by the August 31, 2001 Order be extended by two weeks to September 21, 2001. Despite AT&T's best efforts, the additional discovery that AT&T has been ordered to produce will take some time to compile, and cannot be provided in the four business days contemplated by the August 31, 2001 Order.

STANDARD OF REVIEW AND APPROPRIATENESS OF RECONSIDERATION.

The Department has recognized at least three situations in which a motion for reconsideration is appropriate. Reconsideration can present "previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered." *Boston Edison Company*, D.P.U. 90-270-A, at 2-3 (1991); *Western Massachusetts Electric Company*, D.P.U. 85-270-C, at 12-13 (1987). Alternatively, a motion for reconsideration is appropriate if the Department's treatment of an issue was the result of mistake or inadvertence. *Massachusetts Electric Company*, D.P.U. 90-261-B, at 7 (1991); *New England Telephone and Telegraph*

Company, D.P.U. 86-33-J, at 2 (1989); *Boston Edison Company*, D.P.U. 1350-A, at 5 (1983). Reconsideration is also appropriate where parties have not been "given notice of the issues involved and accorded a reasonable opportunity to prepare and present evidence and argument" on an issue decided by the Department. *Petition of CTC Communications Corp.*, D.T.E. 98-18-A, at 2, 9 (1998).

As demonstrated below, AT&T did not have notice that the issue of what level of information underlying a cost study must be introduced into the evidentiary record to support an agency decision would be decided on an appeal of a hearing officer ruling regarding a discovery dispute. The sophistication and technical nature of the cost models filed by the parties in this proceeding pose unique issues and questions concerning how the Department's evidentiary standards can be most effectively applied. The question of where to draw the line in determining the appropriate evidentiary standard becomes exponentially more difficult when applied to complex electronic cost models. The arguments presented below as to why the evidentiary standard articulated in the August 31, 2001 Order are not consistent with the Department's past practices were not previously presented by AT&T.

Furthermore, it appears that the Department's Order is the "result of mistake or inadvertence" in that it incorrectly assumes that the evidentiary standard it sets forth is consistent with past Department practice and with the presentation by Verizon of its alternative cost model in this proceeding. In addition, there is an important undisclosed fact that was not adequately presented to the Department before issuance of the August 31, 2001 Order. The Department may have been left with the impression that all of the proprietary information at issue in the disputed information requests belongs to TNS (formerly PNR), and thus is within the control of AT&T's vendor. That is true with respect to some of this information, but it is not true with respect to the geocoded data set at issue in request VZ-ATT 1-23. Those data belong to third

parties, not to TNS, and it was licensed to the predecessor-in-interest of TNS subject to the express condition that TNS may not release the data over to others.

AT&T respectfully requests that the Department reconsider the part of its August 31, 2001 Order related to AT&T's production of data that is the intellectual property of third parties (Information Request VZ-ATT 1-23), so that it appropriately can consider these arguments and facts before ruling on an issue as important as the evidentiary standard to be applied in considering cost models for setting UNE rates.

ARGUMENT.

I. THE BASIS FOR THE AUGUST 31, 2001 ORDER IS INCONSISTENT WITH PAST DEPARTMENT PRACTICE AND RULES OF EVIDENCE.

The August 31, 2001 Order is premised on the proposition that "[t]o render a decision, the Department requires relevant information to be spread upon the record," and the assumption that this principle is absolute, all encompassing, and inviolable. *See* August 31, 2001 Order at 18. The Order then requires that all information to be provided in response to a discovery request must necessarily be produced in a form that can "be marked for identification and introduced into the record of the Department's evidentiary proceeding." *Id.* at 19. This decision effectively adopts an evidentiary standard that requires all information potentially relevant to evaluating any aspect of the cost models proposed in this proceeding to be marked at the hearing and "spread upon the record" of the proceeding. On the basis of this new evidentiary standard, the August 31, 2001 Order then requires that AT&T produce, among other things, a copy of geocoded customer location data in a form which can be marked as an exhibit at the hearing. This is the information at issue in Information Request VZ-ATT 1-23.

As demonstrated below, this evidentiary standard goes far beyond that which was imposed by the Department when it first set UNE rates in December 1996. Moreover, the rules

of evidence mentioned by the Department recognize that study results can be properly admitted in evidence even if all underlying data is not made part of the evidentiary record. Significantly, Verizon itself has not complied, and has made clear that it cannot comply, with this new evidentiary standard. (See the accompanying Conditional Motion to Strike Verizon's Recurring Cost Model for more detail on this point.) Because any evidentiary standard adopted by the Department must be applied fairly and evenhandedly to all parties, AT&T respectfully urges the Department to reconsider the new standard set forth in the August 31, 2001 Order, which raises an absolute bar that no comprehensive, TELRIC-compliant cost study could reasonably meet.

A. The Department Did Not Require That All Data Supporting the Original NYNEX Cost Study be "Spread Upon the Record" Before it Set UNE Rates Based on That Cost Study in 1996.

In December 1996, in the *Consolidated Arbitrations* docket, the Department adopted UNE rates based on a cost study submitted by NYNEX. The cost study adopted at that time was replete with data inputs that were never "spread upon the record" by NYNEX and thus never reviewed by the Department.

For example, the loop length assumptions made by NYNEX were "engineering inputs" provided to the company's cost modelers, but the data, documentation, and analysis that led the unidentified, non-witness engineers to come up with these loop length inputs were never made part of the evidentiary record. *See* NYNEX's February 14, 1997, Compliance Filing in the *Consolidated Arbitrations* docket, Workpapers Part A, Page 9 of 45; Anglin, Tr. Vol. 11, 11/11/96, at 37-38. The same is true of many other key inputs to the 1996 loop cost model adopted by the Department. See Anglin, Tr. Vol. 7, 11/5/96 at 56, and Tr. Vol. 11, 11/11/96 at 48.

Similar examples can be found with respect to switching costs. Verizon increased its switch cost estimates using installation and power factors. *See* NYNEX's February 14, 1997,

Compliance Filing in the *Consolidated Arbitrations* docket, Workpapers Part B, Pages 1-78 of 98. Those factors were based on "1995 DCPR Data" which was never provided to the Department and parties or made part of the evidentiary record. *Id.* Page 79 of 98. Some of the switch cost numbers were based on All Hours of the Day ("AHD") to Peak Period or Off-Peak Period Conversion Factors (*id.* at 6, 8, 16, 18, etc.), but those factors were based on a "Special Study-Peak and Off Peak" that was not put into evidence by NYNEX (*id.* at 80). Other switch costs were cased on a Billable Hours to AHD Conversion Factor (*id.* at 7, 9, 10, 17, 19, 20, etc.), but that factor was similarly based on a "Traffic Sample" and a separate "Traffic Study" that were never provided or put into the record (*id.* at 81).

Much the same is true of interoffice transport costs. For example, common transport costs were calculated based on an estimate of the average air distance from central offices to tandem switches, but that estimate was sourced to a "Special Study" that was never made part of the evidentiary record. *See* NYNEX's February 14, 1997, Compliance Filing in the *Consolidated Arbitrations* docket, Part C, Workpaper 8.1, Pages 1-4 of 4, Line 3. Like switching costs, the common transport costs are also based on several conversion factors (*id.*, Lines 10, 13, 14) that are derived from a "Traffic Sample" and a separate "Traffic Study" that were never put into the record (*id.*, Part C, Workpaper 7.0, Pages 1-3 of 3).

The Supreme Judicial Court has recognized that a party is entitled to "reasoned consistency" in agency decision making, and held that a state agency may not refuse to admit evidence of a kind permitted in previous proceedings without articulating an objective reason that would satisfy the requirement of reasoned consistency. *Massachusetts Automobile Rating & Accident Prevention Bureau* v. *Commissioner of Insurance*, 401 Mass. 282, 287 (1987). Here, as demonstrated above, the Department has previously accepted cost studies as a basis for setting UNE rates even when not all the supporting data is in the record. The unexplained change in

position reflected in the August 31, 2001 Order violates the "reasoned consistency" requirement of Massachusetts law.

B. The Rules of Evidence Allow Study Results to be Admitted Even if All Underlying Data Are Not in Evidence.

The Federal Rules of Evidence explicitly recognize that expert testimony reporting test results is admissible even though some of the underlying facts on which the study was based cannot be made part of the record. Fed. R. Evid. 703. *See, e.g. NutraSweet Co.* v. *X-L Eng'g Co.*, 227 F.3d 776, 789-90 (7th Cir. 2000); *Gussack Realty Co.* v. *Xerox Corp.*, 224 F.3d 85, 94-95 (2d Cir. 2000) (testimony properly admitted from expert who did not conduct own tests, but relied on third-party data); *Int'l Adhesive Coating Co., Inc.* v. *Bolton Emerson Int'l, Inc.*, 851 F.2d 540, 544 (1st Cir. 1988) (expert may rely on facts or data not in evidence). Indeed the Advisory Committee Note issued when the federal rule was promulgated recognizes the difficulty of producing and offering into evidence all supporting data and expressly rejects such a rule, noting that the witness' "validation, expertly performed and subject to cross examination, ought to suffice for judicial purposes." Fed. R. Evidence 703, Advisory Committee Note (1972). The Supreme Judicial Court has similarly recognized that "the facts or data on which an expert may rely . . . may not be in evidence." *Commonwealth* v. *Daye*, 411 Mass. 719, 743 (1992) (allowing expert testimony when portions of the testimony were conducted by others). The Massachusetts Advisory Committee's Note on this proposed rule states that "the thrust of the rule is to leave inquiry regarding the basis of expert testimony to cross examination, which is considered an adequate safeguard." *Id.* The same rationale should be applied here. The witnesses sponsoring the cost studies for AT&T in this proceeding will be available for cross-examination. Issues regarding the reliability of supporting data can be fully explored even if all that data is not part of the evidentiary record.

C. Verizon Has Not Complied, and Has Made Clear That It Cannot Comply, With the New Evidentiary Standard Imposed by the Department in Its August 31, 2001 Order.

Significantly, Verizon has not come close to meeting the new evidentiary standard set forth in the August 31, 2001 Order. As detailed in the accompanying Conditional Motion to Strike Verizon's Recurring Cost Model, there are numerous aspects of Verizon's cost study which it has failed to support with all relevant documentary information, as well as repeated instances where Verizon has made clear that it is unable to do so. The Department cannot apply a different evidentiary standard to the Verizon cost study from the one it has imposed with respect to the HAI Model sponsored by AT&T.

Verizon's inability to produce key input data that underlies its cost model demonstrates that it has not and cannot "spread" all such information on the evidentiary record of this proceeding, as the August 31, 2001 Order would require. For example, Verizon's July 10, 2001 letter, in which it continues to refuse to produce any of the inputs purportedly used in Verizon's secret survey of feeder lengths, states that Verizon does not have the documents relied upon by the survey respondents and that to gather them would be an "enormous" undertaking. Yet Verizon is asking this Department to set loop rates based on this secret, unsupported survey of feeder lengths.

There cannot be one standard for evaluating the HAI model and another more lenient standard for evaluating Verizon's cost model. The same evidentiary standards must be applied to both parties and both models. Therefore, AT&T has filed a Conditional Motion to Strike Verizon's Recurring Cost Model. This Motion is not based on Verizon's failure to provide discovery, but on Verizon's inability, by its own admission, to meet the evidentiary standard imposed by the August 31, 2001 Order of spreading on the record all relevant inputs to its cost study. Verizon has clearly stated that it cannot and will not provide all the data underlying its

recurring cost model and thus will not be able to meet the evidentiary standard. AT&T has expressly made this a Conditional Motion, however, because it strongly urges the Department to modify the evidentiary standard articulated in the August 31, 2001 Order. Failure to produce all relevant supporting data should be a factor to be considered in evaluating the models, not an absolute evidentiary prerequisite to any consideration of a model at all. The evidentiary standard recommended by AT&T would be consistent with past Department decisions and would allow for equal treatment of the two models at issue here.

D. The Standards Imposed by the Department Will Hinder a Reasoned Decision Making Process.

The Department should reconsider its August 31, 2001 Order so as to avoid imposing an evidentiary standard that will create very significant burdens on both the parties and the Department, without significantly improving the Department's ability to analyze the cost studies at issue. The discovery and evidentiary standards adopted in the August 31, 2001 Order will simply increase exponentially the volume of paper that must be processed by the parties and the Department without any expectation that a better analysis will result. Moreover, the strict evidentiary standard articulated by the Department will turn proceedings into a "gotcha" game, where any alleged failure to supply supporting documentation will generate a motion to strike, rather than being appropriately used to determine the weight to be given the evidence that is in fact produced.

E. The Access to the Proprietary Customer Location Information Offered by AT&T Will Provide Verizon with Appropriate Ability to Review and Analyze the Geocoded Data Set, and the Hearing Officer's Decision Not to Compel a Further Answer to VZ-ATT 1-23 Should be Affirmed.

The access to the geocoded data set offered by AT&T is more than adequate to fulfill AT&T's appropriate discovery obligation.

The Department instructed AT&T to make arrangements with its vendors to release proprietary or intellectual property that is the subject of the information requests at issue on Verizon's motion to compel. August 31, 2001 Order at 19. AT&T has done so. To the extent that the additional information that AT&T has been ordered to produce is the intellectual property of AT&T's vendor TNS (the successor to PNR), such as the clustering algorithm software that is the subject of request VZ-ATT 1-26, AT&T believes that it will be able to produce the additional information ordered by the Department. However, the geocoded data set requested in VZ-ATT 1-23 is not owned by TNS, but rather consists of data licensed to it by third parties subject to the condition that it not be released. AT&T does not expect that this legal limitation can be altered.

Verizon has steadfastly refused to speak with AT&T regarding accessing the geocoded data set via remote access to TNS computers, and thus it is hard to know what Verizon wants to be able to do but frets that it cannot do. The only clue comes in the 1998 Affidavit of Jino W. Kim that was appended to the reply comments filed by Verizon on August 24, 2001. That affidavit says in paragraph 8 that what is needed is the ability to subject the data set to computer analysis "with appropriate software." As AT&T has tried to make clear, Verizon can do that. It can use whatever software it deems to be appropriate to analyze the geocoded data set in any way that it sees fit, and can do so by accessing that data set remotely through TNS's computer system. If Verizon is sincere about wanting to analyze this data set, it should not matter one whit whether the data set resides on the TNS computer or whether it is handed over to Verizon. Verizon has made no effort to contact AT&T and work out the technical details of this access. In so doing, Verizon has flouted the Department's groundrules for this docket, which in paragraph II.2 require Verizon to consult with AT&T before bringing any discovery dispute to the Department. The Department criticizes "AT&T's offer to provide access to the data [as being]

vague and lacking sufficient explanation." AT&T respectfully suggests that this is unfair. Verizon has refused to confer with AT&T about obtaining access to the data requested in VZ-ATT 1-23. AT&T cannot respond in concrete terms to mere posturing by Verizon. As long as this posturing successfully diverts the Department's attention away from the real issues in the proceeding, Verizon will have no incentive to accept AT&T's offer.

As detailed in AT&T's Opposition to Verizon's Appeal from the Hearing Officer's Ruling on Verizon's Motion to Compel, TNS has agreed to offer remote electronic access to the data set sought in VZ-ATT 1-23. Verizon could use the software of its choosing to analyze or manipulate that data as it sees fit. Verizon could create and retain reports, calculations or analyses based on such a review. The access offered by AT&T is more than sufficient to allow Verizon to probe the accuracy of this aspect of the HAI model and is entirely consistent with the procedure used by the FCC to allow evaluation of such data in connection with the USF proceeding. Any differences in procedure between the Department and the FCC do not warrant a different result with respect to this discovery issue. The legitimate interest of TNS in honoring its contractual obligation not to release proprietary data belonging to third parties can and should be accommodated by requiring Verizon to access this data electronically through TNS. Verizon will be able to evaluate this data and make whatever arguments it deems appropriate. The Department will then be free to evaluate the merits of both models, taking into consideration the support offered for each model.

II. AT&T SHOULD BE GIVEN ADDITIONAL TIME TO PRODUCE THE VOLUMINOUS ADDITIONAL DISCOVERY RESPONSES NOW ORDERED BY THE DEPARTMENT.

The August 31, 2001 Order requires AT&T to produce all responses to the discovery requests that were the subject of Verizon's appeal by September 7, 2001. That Order was not issued until late in the day on August 31, the Friday before the Labor Day Weekend. As a result,

AT&T effectively has had less than four business days to produce all the additional material required to be produced by the August 31, 2001 Order. Prior to August 31, AT&T had been led to believe by the prior Hearing Officer ruling that it was not required to respond any further to the information requests that were the subject of Verizon's appeal. Especially in light of the length of time that it has taken Verizon to provide useable versions of its cost models and to provide its own discovery responses, it is only fair that AT&T be given a reasonable amount of time to gather and produce the additional information ordered by the Department.

AT&T is diligently working to assemble and produce that material, but practical constraints involving contacting all of the necessary people to gather this material will require another two weeks to complete production. AT&T will produce responses on a rolling basis as they become available. Therefore, AT&T requests that it be allowed until September 21, 2001 to complete the required production. The brief additional time requested by AT&T is necessary to allow AT&T a meaningful opportunity to comply with the Department's Order.

Significantly, Verizon has had far longer to provide discovery materials and even to provide useable versions of Verizon's direct case in this proceeding. For example, when Verizon filed its direct case on May 8, 2001, the electronic copies of the proprietary cost models that it filed were unusable. It was not until May 18, 2001, that Verizon provided CD-ROMs that AT&T's expert witnesses were able to open and use. Then, in late June, AT&T's switch cost expert discovered a discrepancy between (i) the outputs produced by the electronic SCIS model Verizon had provided, and (ii) the SCIS model results shown as inputs in the switch cost workpapers filed in May by Verizon. AT&T notified Verizon of this discrepancy on June 26, 2001, and after several telephone conversations with Verizon about the issue AT&T reiterated its concerns in a letter dated July 3, 2001. On July 27 – four weeks after Verizon had first been notified of the discrepancy, and two and one-half months after the ultimate May 8 deadline for

filing direct testimony – Verizon suddenly provided an entirely new electronic copy of the SCIS model.

Verizon has similarly taken many weeks or months to provide discovery responses in this docket. For example, on May 8, 2001, AT&T served request ATT-VZ 3-1, which asked Verizon to "provide all switch contracts, competitive bids, quotes, and correspondence that control the price of new circuit switches in Verizon's operating territories." The switching contracts sought in this request included documentation that Verizon specifically relied upon in formulating its own cost model. *See, e.g.*, Verizon Panel Testimony at 153 (filed May 8, 2001). Verizon produced some, but not all, of the requested switching contracts on June 19, 2001, or six full weeks after they were first requested.[2] Verizon's own discovery response log confirms that Verizon frequently took many weeks beyond the target response time of 10 days to provide discovery responses in this proceeding. *See also* September 5, 2001 e-mail from Hearing Officer Marcella Hickey in DTE 01-20 (expressing concern that Verizon has not yet responded to two discovery requests from the Department, even though the 10 day good faith effort period for responding passed on August 17, 2001).

It would be inappropriate and unfair to require AT&T to compile and produce all of the additional material called for in the August 31, 2001 Order within four business days, when Verizon has frequently if not routinely taken many extra weeks to provide its responses. In fact, it would be impossible for AT&T to do so. AT&T will produce as much additional information as possible by September 7, but it is quite literally impossible to search out and produce all of it without the requested extension of time.

[2] Verizon did not even provide a written response to this request until June 15.

CONCLUSION.

For the reasons stated above, AT&T respectfully requests that the Department reconsider its August 31, 2001 Order and: (1) deny Verizon's appeal with respect to information request VZ-ATT 1-23, which involves the intellectual property of third-parties; and (2) extend the time for AT&T to respond to the remaining requests until September 21, 2001.

AT&T COMMUNICATIONS OF NEW ENGLAND INC.

Respectfully submitted,

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